Notre Dame Journal of Law, Ethics & Public Policy

Volume 14
Issue 1 *Symposium on Ethics*

Article 10

February 2014

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Recommended Citation

Robert F. Cochran Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 305 (2000).
Available at: http://scholarship.law.nd.edu/ndjlepp/vol14/iss1/10

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PROFESSIONALISM IN THE POSTMODERN AGE: ITS DEATH, ATTEMPTS AT RESUSCITATION, AND ALTERNATE SOURCES OF VIRTUE

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There is a new emphasis on professionalism within legal education and the organized bar. The leaders of the profession call on lawyers to go beyond the incentives of the market and beyond the requirements of the professional rules—to seek justice, to be more honest and tolerant, to be less adversarial and selfish, and to give more of their time and resources to the poor. They call on law professors to instill these values in law students. The moral basis for this call to service is our status as professionals. The word "professionalism" appears almost as a mantra, a word which if repeated often enough will release mystical moral power.[1] But, whatever power it once had, calls to professionalism no longer seem to inspire.

This focus on professionalism comes at a time when the reputation of the legal profession has fallen to new depths,[2] but it

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1. *See, e.g.*, Deborah L. Rhode, *The President's Message: The Professional Responsibility of Professional Schools*, AALS NEWSL., Feb. 1998, at 1-5; Deborah L. Rhode, *The President's Message: Professional Education and Professional Values*, AALS NEWSL., Apr. 1998, at 1, 4; Jerome J. Shestack, *President's Message: Advancing Professionalism Needs Judicial Help*, A.B.A. J., Apr. 1998, at 8; Jerome J. Shestack, *President's Message: Our Continuing Professional Odyssey*, A.B.A. J., Aug. 1998, at 8; and Jerome J. Shestack, *Taking Professionalism Seriously*, Aug. 1998, at 70. *See also* A.B.A. J., Aug. 1998, at 48-69 (containing three additional articles on professionalism). In *President's Message: Advancing Professionalism Needs Judicial Help*, *supra*, President Shestack uses the term "professionalism" or one of its variations 22 times, much as President Rhode uses the term twice in the titles of each of her first two messages as AALS President. The attempt, of course, is to use the moral resonance of the term to call lawyers to action. I think, however, that the term has lost its power. President Shestack's title and article suggest the quandary of the profession; professionalism is no longer an internal moral drive shared by lawyers; it must be required by judges.

2. *See* MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); ABA COMM'N ON PROFESSIONALISM 2 (1986), *quoted in* RICHARD L. ABEL, AMERICAN LAWYERS 243 (1989). In 1986, the ABA Commission on Professionalism

has a familiar ring. As day follows night, since the 1960s, each decade has seen a series of highly-publicized, lawyer-led scandals followed by the organized bar's attempt to create a cleansing wave of professionalism. The Watergate scandals of the 1970s were followed by the Model Rules of Professional Conduct, the MPRE, and required, law school courses on professional responsibility; the securities and savings and loan scandals of the 1980s were followed by the ABA's *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* and the Third Restatement of the Law Governing Lawyers; and, now, the O.J. and Menendez trials, Whitewater and Zippergate are yielding their own calls for professionalism.[3]

Though I wish the new professionalism well, I am not hopeful. In a postmodern age, there is little common moral ground to which we can appeal.[4] I fear that the foundations for professionalism are gone. Moreover, the concept of professionalism carries dubious baggage. In a postmodern age, there may be greater hope in encouraging lawyers to explore their own moral and religious traditions for lawyerly ideals. In this essay, I consider the traditional concept of professionalism, its death in the postmodern era, and alternate possibilities for lawyer renewal.

I. TRADITIONAL PROFESSIONALISM

The concept of professionalism emerged from the religious orders of the Middle Ages. To be a professional was originally *to profess* something, a commitment to one's religious order.[5] Some

found that "only 6% of corporate users of legal services rated 'all or most' lawyers as deserving to be called 'professionals.' Only 7% saw professionalism increasing among lawyers; 68% said it had decreased over time. Similarly, 55% of the state and federal judges . . . said lawyer professionalism was declining." *Id.* (citations omitted).

3. Rayman Solomon traces the pattern of crisis followed by a focus on professionalism back even farther. He finds that five crises between 1925 and 1960 (prohibition, the great depression, court-packing and the growth of federal regulation, McCarthyism, and the specter of federally funded legal services) each generated its own focus on professionalism within the bar. *See* Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (Robert L. Nelson et al. eds., 1992).

4. Russell Pearce has argued that we are experiencing a paradigm shift in which both the public and lawyers have come to view law as a business, rather than a profession. *See* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Disregarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1246-67 (1995). Pearce argues that, rather than seek to restore law as a profession, we should regulate it as a business.

5. *See* BRUCE A. KIMBALL, THE "TRUE PROFESSIONAL IDEAL" IN AMERICA: A HISTORY 19 (1992).

of the religious orders developed expertise in special disciplines: divinity, law, and medicine. The term "professional" came to describe those with special expertise in these areas.[6]

As the legal profession evolved in England and the United States, it lost its religious character. In the United States, lawyers became, in de Tocqueville's phrase, "the American aristocracy."[7] The founders of the American Bar Association in the late nineteenth century were "primarily well-to-do business lawyers, of old American stock," and sought to create an elite organization of the "best men of the bar."[8] Through most of the twentieth century the organized bar remained primarily in the control of those in large, big-city law firms, the "male, Anglo-Saxon, upper-class Protestants who attended elite law schools."[9]

Professional ethics were the ethics of gentlemen[10]—the generic, Judeo-Christian ethics of the upper class churches. They were embodied in statements of professional aspiration: law professor David Hoffman's *Observations on Professional Deportment* (1817),[11] Judge George Sharswood's *Essay on Professional Ethics* (1854),[12] the ABA Canons of Professional Ethics (1908), and the "Ethical Considerations" of the ABA's Code of Professional Responsibility (1969). Leaders of the bar argued that the practice of law should be a life "dedicated primarily to the public service . . . [and] the fact that it is a means of livelihood to its members is purely coincidental."[13]

The foundation for the lawyer's professional (and moral) responsibility was his (almost always *his*[14]) belief that he had been given much, and that with his circumstantial superiority went responsibilities. It was a matter of noblesse oblige. This was a

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6. *See* DENNIS M. CAMPBELL, DOCTORS, LAWYERS, MINISTERS: CHRISTIAN ETHICS IN PROFESSIONAL PRACTICE 19 (1982).

7. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 125 (Richard D. Heffner ed., 1984).

8. John A. Matzko, *"The Best Men at the Bar": The Founding of the American Bar Association, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 75 (Gerald W. Gawalt ed., 1984), *quoted in* Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 669 & n.56 (1984).

9. *See* ABEL, *supra* note 2, at 208-11; Mashburn, *supra* note 8, at 674.

10. *See* Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 397-404 (1990).

11. DAVID HOFFMAN, A COURSE OF LEGAL STUDY (1817).

12. George Sharswood, *An Essay on Professional Ethics*, 32 ABA REP. 1 (5th ed. 1907).

13. Thomas B. Hill, Jr., *The President's Annual Address*, 14 ALA. LAWYER 342, 346 (1953).

14. *See* ABEL, *supra* note 2, at 90.

message that bar leaders had heard all of their lives. It was preached at elite Anglican and Episcopalian prep schools over the centuries. "From everyone to whom much has been given, much will be required . . . ."[15] The headmaster's speech to the 193rd entering class at St. Matthew's School in the movie *School Ties* [16] was typical:

> You, my boys, are among the elite of the nation and we strive here at St. Matthew's to prepare you for the heavy responsibility that comes with favored position. Today, more than ever, this country needs an elite that cares more for honor than for advantage, more for service than for personal gain. To that end let us beseech the help of God in whose name we pray.

(In the movie, the lower-class Jewish boy, who had been admitted on an athletic scholarship, found the speech more odd than inspiring.[17]) The legal profession's manifestation of this ethic was its call for a life of public service in the law.

My point is not that the gentlemen of earlier generations always lived up to their ideals. At times they did; at times they did not.[18] (One of the themes of *School Ties* is that often they did not.) But the traditional professional ideals were built on a deeply rooted moral foundation that was widely shared among the leaders of the bar.

II. THE DEATH OF PROFESSIONALISM

Over its history, membership at the bar has gradually opened to outsiders despite the resistance of the bar's professional elites.[19] Women, the Baptist and Methodist descendants

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15. *Luke* 12:48.

16. SCHOOL TIES (Paramount Pictures 1992).

17. I am not suggesting that his Jewish heritage did not provide a basis for public service—I later make the point that it does. My point is that appeals to elitism are unlikely to be effective with those who do not consider themselves to be elite.

18. *See* Theodore Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 375 n.77 (1993) (providing studies showing that those with higher income are most willing to engage in pro bono public service); Monroe Freedman, *A Brief "Professional" History*, LEGAL TIMES, Dec. 17, 1990, at 22. As David Luban has said, "Perhaps it would be most accurate to view the elite late-nineteenth-century bar as a somewhat schizophrenic mix of public spirit and private service." David Luban, *The* Noblesse Oblige *Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 720 (1988).

19. *See generally* JEROLD S. AURERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976) (discussing how the common people were denied access to the elite law schools and law firms); *id.* at 25, 29.

of the Great Awakenings, the Jewish and Catholic children of immigrants, and the great-grandchildren of African slaves found places as members of the bar, though not generally in its leadership. At first, the attempt was to re-educate the newcomers. They were taught to wear coats and ties to law school class—the dress of the upper class. They were taught the King's English. I still recall my law professors in the mid-1970s correcting my middle-class rhetoric. English barristers were more methodical at this than their American cousins-at-the-bar. They required the natives of the Commonwealth countries to come to London for a year, to dress for dinner each night at the Inns of Court, and to learn the manners of English gentlemen. But in a more egalitarian country like the United States, the leaders of the bar could only provide so much cultural re-education.

The elitist foundations of professionalism in the United States crumbled in the 1960s and 70s for several reasons. The diversity of the profession greatly increased. The number of minority law students in ABA law schools went from 1% in 1965 to 9.9% in 1983-84.[20] Opening the bar was a matter of justice, but as the bar has grown more diverse, elitist appeals to professionalism have had decreasing appeal. It may be that "[f]rom everyone to whom much has been given, much will be required," but the new members of the bar had not been given much. Many of those from the middle class felt that they had earned it. Many of those from minority groups felt that they were owed more. The new admittees questioned the teachings of their professional elders. Why should they trust the moral instruction of those who had excluded their mothers and fathers? It is not surprising that appeals to an ethic founded on elitism did not inspire. My point is not that the new admittees did not have moral values that could guide them in their law practices; it is merely that calls to professionalism no longer served as a source of inspiration.[21]

Leaders of the bar expressed special concern about allowing immigrants to become lawyers. *See* ABEL, *supra* note 2, at 69 (Character tests "were deliberately introduced in order to exclude immigrants and their sons"), 109 ("At the beginning of this century, the professional elite were quite open about their desire to exclude Jewish and Catholic Eastern and Southern European immigrants and their sons."); AURERBACH, *supra*, at 99-100, 121-22.

20. *See* ABEL, *supra* note 2, at 100-01.

21. Anthony Kronman has argued that the opening of large law firms to diverse groups has undercut the ability of those firms to maintain common ideals. *See* KRONMAN, *supra* note 2, at 291-94. "[T]he cultural milieu that large-firm lawyers now inhabit repudiates not only the worst prejudices of the past but its highest ideals of craftsmanship and character as well." *Id.* at 291. With the loss

Not only did appeals to professionalism fail to inspire the new admittees, they no longer inspired the children of the elite. The children of the upper class became ambivalent about their status. The dream of the children of the 60s was an egalitarian dream: "Power to the people." Elite status was something to be rejected; it was not something likely to serve as the foundation for a professional ethic.

Finally, in the 1960s and 70s, postmodern thought swept the university. Its messages undercut the possibility of a professional ethic in a couple of ways. It first tore down liberalism's notion that we could discover moral truth through reason alone. It recognized that moral thought is based on pre-rational assumptions that emerge from communities, and that those assumptions can vary from community to community. It disclosed the not-so-neutral assumptions of liberalism. A second (and more dubious) postmodern message was that there is no truth to be discovered; there is only power. Postmodern nihilism left no place for a common social agenda.[22] Both messages undercut the possibility of a pervasive professional ethic. If moral thought is rooted in the presuppositions of communities, by what right do members of one community impose professional obligations on those of another? If there is no truth, only power, why should an attorney do anything but seek his or her own power? In a postmodern world there is not a shared moral foundation on which to build and encourage professional ideals.[23]

In seeking to breath new life into the concept of professionalism, its advocates face the same problem that was faced by those who drafted the ABA's 1983 Model Rules of Professional Conduct. The predecessors to the Model Rules provided aspirational standards for lawyers. Even the ABA Model Code, adopted only fourteen years prior to the Model Rules, gave priority to ethical aspirations—its Ethical Considerations preceded and were given more space than the rules that subjected a lawyer to disci-

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of common ideals, it may be the only common goal that the lawyers in the modern law firm share is that of money-making. *See id.* at 294-300.

22. *See* Anthony E. Cook, *Reflections on Postmodernism*, 26 NEW ENG. L. REV. 751, 752-53 (1992). I share Cook's belief that the proper lesson from the postmodern critique is one of humility rather than nihilism. *See id.* at 767-71. We cannot know all of the truth, but we can seek it and act on our best understanding of it.

23. Some argue for the profession's return to the concept of noblesse oblige. *See, e.g.*, Philip S. Stamatakos, *The Bar in America: The Role of Elitism in a Liberal Democracy*, 26 U. MICH. J.L. REF. 853, 886 (1993) ("Elitism therefore should be redefined with regard to the Bar in a way commensurate with the concept of noblesse oblige."). But the status of the profession has dropped so low that there is little prospect of building a sense of ethical obligation on it.

pline (the Disciplinary Rules). But the 1983 Model Rules contained only rules. The profession gave up on defining the good lawyer; the Model Rules defined only the bad lawyer. Attempts to establish a new professionalism face a similar prospect. They may have an even more challenging task. There is probably less common moral ground within the legal profession now than in 1983. It may be that a shared conception of the lawyer's moral responsibility is no longer possible.

III. THE DANGERS OF PROFESSIONALISM

My concern is not only that the new professionalism will fail to inspire lawyers to virtue, but that it will inspire them to vice. The concept of "professionalism" has an odd mix of meanings and is used to justify all sorts of lawyer behavior, some of which is not so good.

A. *Professional Self-Protection*

The bar has always pointed to professionalism as a justification for its right to self-regulation: "We are professionals, we will look out for the public interest." But much of the profession's self-regulation has been self-serving. Historically, the legal profession justified its fee schedules, advertising prohibitions, rules against unauthorized practice, low bar passage rates, and restrictive law school accreditation standards on the basis of professionalism. The profession argued that these practices promoted higher quality legal services, but these practices also undercut the bar's asserted goal to make legal services widely available. The bar justified these practices as means of public protection, but it is difficult to believe that they have not more often been means of the bar's self-protection. Richard Abel goes so far as to define "professionalism" as a matter of "market control"; he found that when the profession has been able to limit entry, lawyer income has gone up, and vice versa.[24] At the very least, the bar had a conflict of interest as to these matters that undercut its claim to the right of self-regulation. There is a danger that the profession will use calls to professionalism to further insulate itself from public accountability.

B. *The Professional Hired Gun*

Some lawyers claim that unrestrained advocacy on behalf of clients is an aspect of professionalism. Though they justify aggressive advocacy as a matter of public service ("it will yield

24. *See* ABEL, *supra* note 2, at 159.

truth and justice and protect client autonomy"), it is hard not to notice that lawyers most often protect the autonomy of those who least need it—the wealthy. The adversary system is the legal system's equivalent of the free market, and unrestrained advocacy, like unrestrained capitalism, is likely to benefit the rich (and their lawyers), at the expense of the poor. Those who cannot afford lawyers need greater autonomy, but the wealthy clients, whom lawyers are more likely to serve, may need less autonomy. They may need lawyers who will encourage them to consider the interests of other people.

The growing use of the term "professional" to indicate a willingness to sacrifice one's standards for the employer is not limited to lawyers. According to Douglas Yeo of the Boston Symphony Orchestra, he and his colleagues at times play "pablum" and "drivel" while "gritting our teeth," but "*as professionals we will play as well as we can anything that is put on our music stands . . . .*"[25]

Some lawyers glibly refer to themselves as hired guns, but other lawyers, especially women, use a more troubling metaphor for their lives as professionals: "It's like being forced into a sex relationship you didn't anticipate. It's a screw job. It feels horrible to do something that you wouldn't do normally. . . . I have to contradict myself depending on what role I'm taking . . . . *It's sort of professional prostitution.*"[26] Still other lawyers respond to the moral challenges of law practice with professional distance from the client and from what they do as lawyers. "I'm a professional. I live and die by my reputation. I'm going to do a good job if I think you're an asshole, [or] if I think you're a nice guy. *I try and be as professional as possible and I try to have a thick skin.*"[27]

For these lawyers, professionalism is moral schizophrenia, with one set of values at the law office and another at home. Lawyers live in cognitive dissonance, with their professional values in conflict with their personal values. One danger, of course, is that the "professional" values will come to dominate all of life.

25. Douglas Yeo, *The Politics of Music*, FIRST THINGS, Jan. 1997, at 9 (emphasis added).

26. RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 112 (1989) (emphasis added).

27. *Id.* at 104-05 (emphasis added).

C. *Professional Paternalisms,*[28] *Old and New*

The traditional lawyer's notion of professionalism was quite different from that of the hired gun. The traditional lawyer did not do what he was told by the client; he told the client what to do. Whereas some of today's lawyers see their obedience to client wishes as a mark of professionalism, the traditional lawyer saw his control of the relationship as a mark of professionalism. Judge Clement Haynsworth reflected this view to a law school graduating class:

> [The lawyer] serves his clients without being their servant. He serves to further the lawful and proper objective of the client, but the lawyer must never forget that he is the master. He is not there to do the client's bidding. It is for the lawyer to decide what is morally and legally right, and, *as a professional, he cannot give in to a client's attempt to persuade him to take some other stand* . . . . During my years of practice, . . . I told [my clients] what would be done and firmly rejected suggestions that I do something else which I felt improper.[29]

Whereas today's hired gun has no place for the morals of the lawyer, the traditional lawyer had no place for those of the client.

Lawyer paternalism also has a modern manifestation. Whereas some lawyers play the hired gun attacking others at the direction of the client, other lawyers play the godfather (the godfather of the Mario Puzo novel and the Francis Ford Coppola films)—attacking others irrespective of the wishes of the client.[30] This lawyer, in the words of William Simon, resolves "questions unilaterally in terms of the imputed ends of [client] selfishness."[31] For some, this is a professional attribute of the lawyer. As one client said, after his lawyer sought huge damages for a dubious claim:

> [T]he lawyer is a reassuring presence who takes away your guilt feelings. He says, "Hey, this is the way the game is played; you take as much as you can get; it's what they

28. The classic discussion of paternalism as an aspect of lawyer professionalism is Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

29. Clement F. Haynsworth, Jr., *Professionalism in Lawyering*, 27 S.C. L. REV. 627, 628 (1976) (emphasis added).

30. *See* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 5-14 (1994).

31. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 56.

> expect; it's the way it's done." *[The lawyer] takes upon his own shoulders the burden of your guilt—he's the professional.*[32]

For some, professionalism requires a lawyer to do whatever the client wants; for others, professionalism requires a lawyer to impose his morals on the client; for others, professionalism requires a lawyer to direct the client to act selfishly. It may be that in a postmodern world, the term "professionalism" can mean whatever the lawyer wants it to mean.

IV. ALTERNATE SOURCES OF VIRTUE FOR A POSTMODERN PROFESSION

The foregoing has suggested that the concept of professionalism today is both too weak and too dangerous to yield the responsible exercise of professional power. Other existing sources of lawyer guidance have their shortcomings as well. The market generates high quality legal services for savvy, wealthy clients, but gives little aid to the poor and middle-class and tends to exacerbate the problems of lawyer advocacy as lawyers focus solely on the interests of their wealthy clients. The rules of the profession and legal malpractice rules set minimum standards for lawyers, but law can only do so much. It is impossible to require the virtues that the legal profession needs and excessive regulation can undercut the possibility of developing those virtues.[33]

In an earlier section of this essay, I suggested that in a postmodern era it is not surprising that the legal profession has been unable to establish a common ethic among lawyers. With a more diverse profession has come the loss of a common moral vision. It may be, however, that the key to renewed virtue in lawyers is to look within that diversity for moral insight. The very thing that caused the death of the old professionalism may provide a possibility for moral renewal. If Alasdair MacIntyre is correct that moral development comes primarily from within communities,[34] we should encourage these communities to develop moralities (and theologies) of lawyering. It may be that from the particular traditions of those within the profession will emerge ways of lawyering that will transform not necessarily the

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32. DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 171 (1974) (emphasis added).

33. *See* Robert F. Cochran, Jr., *Lawyers and Virtues*, 71 NOTRE DAME L. REV. 707, 721-25 (1996); Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311 (1987).

34. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 220 (2d ed. 1984).

whole profession, but the way that significant groups of lawyers practice.

Many of the communities from which lawyers are drawn have long traditions of moral discourse and reasoning, though for various reasons there has not been a history of applying this reasoning to the practice of law. Many of these communities have not had members in the profession until recently. The energies of many immigrant groups and peoples of color have focused upon opening the profession to their members rather than determining the moralities of lawyering that should apply once they got there. Many have been willing to leave it to the elite community that controlled the bar to define the good lawyer. But with the breakdown in professionalism, it may be up to the traditions of those within the legal profession to define virtue for their members. We need to begin to look to ways that our various moral traditions can teach us how to be good lawyers.

Looking to particular communities for professional guidance is, of course, the opposite of the way that the profession has dealt with such questions. Law schools and bar associations separate the professional from the personal. What one's church, synagogue, or other community of memory teaches is relegated to one's personal life, not something which should have an impact on what one does as a professional. The issue is framed in terms of professional values versus personal values,[35] and, of course, in trying to decide what to do in one's professional life, professional values are supposed to win out. However, increasingly, professional values have little power to inspire. In addition, it is wrong to suggest that values formed within particular communities are merely "personal values"; I have little faith that the person, acting alone, will come up with values, professional or otherwise, that are worth living by. But, our religious and other moral traditions provide far more than 'personal' values. They draw on memories, stories, virtues, and rules that have their source beyond living memory; they have evolved over long periods of time, based on the wisdom of many that have gone before. That is not to say that they are perfect; they are not. But they are resources that their members should look to, explore, critique, and draw from.

35. *See* Bruce A. Green, *The Role of Personal Values in Professional Decision-making*, 11 GEO. J. LEGAL ETHICS 19 (1997); Geoffrey C. Hazard, Jr., *Personal Values and Professional Ethics*, 40 CLEV. ST. L. REV. 133, 133 (1992); Simon, *supra* note 31, at 130-44 (proposing a "non-professional advocacy" model based on personal ethics).

The particular communities of which lawyers are a part may not only be worthwhile sources of standards for their lawyers, but they may also be sources of inspiration. These communites are more likely than the profession to inspire lawyers to go beyond the requirements of professional codes and against the incentives of the market. Their teachings are the kind which are likely to wake you up in the middle of the night with questions about the direction of your life. They can change the way a person lives.

Let me illustrate the effect that particular traditions might have on lawyers with a look at one of the most important issues facing the legal profession, the need for legal services to the poor, from the perspective of the tradition that I know best, my own evangelical Christian tradition. My tradition is not one that has had many leaders of the profession. Most of its lawyers practice alone or in small groups. It is a tradition that has often focused on other-worldly concerns—on personal salvation, on the spiritual life, on the end times, and on heaven—at the expense of what the tradition might say about life in this world. As such, it has generally been a willing partner to the divided, professional life/personal life thinking that has been dominant among lawyers.

The need of the poor for legal services is an oft-told tale. The need is huge. The federal government has severely cut back its support, and there is little support within the bar for mandatory pro bono service. The only realistic option seems to be encouraging contributions and volunteer service. The question is how best to inspire it. Imagine that you are an evangelical Christian lawyer or law student. Which of the following is likely to affect the way that you practice law?

First, the profession's admonition from the ABA Model Rules: "A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."[36] The comment to the rule provides two grounds for the appeal: "personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer" and "the provision of pro bono services is a professional responsibility . . . ."[37] Service to the poor can be rewarding, but it is also time-consuming, hard work and there are many rewarding things that attract a lawyer's attention. The bar's experience with volunteer-based programs is that the inherent rewards of that service are not enough for most people. Bar association emphasis on pro bono

36. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983).

37. *Id.* Rule 6.1 cmt.

service has been followed by an initial burst of activity, which has quickly faded.[38]

Next, consider the teaching of the Christian tradition. On one of the many occasions when Jesus spoke of the Christian's responsibility to the poor, he describes the final judgement:

> [T]he king [Jesus speaks of himself] will say to those at his right hand, "Come, you that are blessed by my Father, inherit the kingdom prepared for you from the foundation of the world; for I was hungry and you gave me food, I was thirsty and you gave me something to drink, I was a stranger and you welcomed me, I was naked and you gave me clothing, I was sick and you took care of me, I was in prison and you visited me." Then the righteous will answer him, "Lord, when was it that we saw you hungry and gave you food, or thirsty and gave you something to drink? And when was it that we saw you a stranger and welcomed you, or naked and gave you clothing? And when was it that we saw you sick or in prison and visited you?" And the king will answer them, "Truly I tell you, just as you did it to one of the least of these who are members of my family, you did it to me." Then he will say to those at his left hand, "You that are accursed, depart from me into the eternal fire prepared for the devil and his angels; for I was hungry and you gave me nothing to drink, I was a stranger and you did not welcome me, naked and you did not give me clothing, sick and in prison and you did not visit me." Then they also will answer, "Lord, when was it that we saw you hungry or thirsty or a stranger or naked or sick or in prison, and did not take care of you?" Then he will answer them, "Truly I tell you, just as you did not do it to one of the least of these, you did not do it to me." And these will go away into eternal punishment, but the righteous into eternal life.[39]

Teachings such as this have led to the founding of the Salvation Army, the Sisters of Mercy, the Rescue Missions, and most of the non-governmental providers of services to the poor in this country. "[T]he most anomic individuals in our society, the denizens of skid row for example, are cared for almost exclusively by voluntary associations, usually religious in character."[40] When

38. *See* Committee to Improve the Availability of Legal Services, *Final Report to the the Chief Justice of the State of New York*, 19 HOFSTRA L. REV. 755, 824-28 (1990).

39. *Matt.* 25:34-46.

40. PETER L. BERGER & RICHARD JOHN NEUHAUS, TO EMPOWER PEOPLE 32 (1977).

asked to explain her service for half a century to the poorest-of-the-poor in India, Mother Teresa responded that she sees Christ in each of the poor. It may be that Christ's teachings and similar teachings from other traditions can lead to the development of ministries that serve the legal needs of the poor.

I am not suggesting that there are not similar values in other moral traditions; my point is that there are. We need to draw on the resources of all of our traditions if lawyers are to have and respond to a high calling.

V. WHAT IS TO BE DONE?

Lawyers and law students need to be challenged to think about the implications of their own moral traditions on their lives as lawyers. Morality is more likely to take hold and to affect one's life when it is drawn not from the ethical considerations of the profession, but from the deepest source of values of the person. Traditions need to struggle with the implications of their teachings for the practice of law; the bar and law schools need to encourage and enable them to do so.

Of course, such work would not proceed on a blank slate. There are hopeful signs: Jews debate their role in the adversary system in the pages of *Tikkun*;[41] feminists discuss the implications of an ethic of care for the practice of law;[42] Mennonites and Native Americans introduce restorative justice as a means of reconciling criminal offenders and victims;[43] the Critical Legal Studies movement explores religious sources of renewal for lawyers;[44] faith-based ministries join with lawyers to provide legal services to the poor;[45] books challenge lawyers to bring their religious val-

41. *See* Alan Dershowitz & Peter Gable, *Current Debate: The Moral Obligation of Defense Lawyers*, TIKKUN, July-Aug. 1997, at 7-10; *Current Debate: The Moral Obligation of Defense Lawyers* (Part II), TIKKUN, Aug.-Sept., at 20-24. *See also* Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993); Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613 (1993).

42. *See* Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

43. Symposium, *Restorative Justice and Religious Traditions: A Post-Modern Encounter*, HAMLINE UNIVERSITY SCHOOL OF LAW, Oct. 22-23, 1998.

44. CLS Forum on Spirituality, San Francisco, California, Jan. 9, 1998.

45. For example, Bet Tzedek Legal Services (Jewish), Los Angeles, California; River of Life Mission Christian Legal Clinic, Honolulu, Hawaii; New Mexico Christian Legal Aid, Albuquerque, New Mexico; Pepperdine/Union Rescue Mission Legal Aid Clinic, Los Angeles, California.

ues to the practice of law;[46] and religious symposia in three law reviews provide reflections from a wide variety of religious traditions on law practice.[47]

The surprising thing is how little exposure lawyers and law students have to any of this. The ABA has given little or no coverage to such sources of value for lawyers. I know of only five law school professors in the United States who have taught seminars exploring religious teachings and the practice of law.[48]

Let me make a specific proposal. Law schools should offer seminars that explore the implications of specific religious and moral traditions for the lawyer. Students could explore the implications of their own traditions for their lives as lawyers. Such seminars might enable some to find meaning in the practice of law and inspire them to find ways that their practice might serve the public interest.[49]

VI. Is There Hope for a Common Professional Morality?

Despite its weaknesses, dangers, and ambiguities, I do not want to see the end of the professionalism movement. Its calls for public service continue to have resonance with some lawyers. Even if our communities of memory take up the challenge of identifying lawyering values, that will not provide moral direction for all lawyers. Many lawyers do not have moral traditions to which they look for guidance. For many lawyers, professional ethics may be the only source of guidance.

A final question is whether there is the possibility of a common professional ethic, or are we destined, at best, to seek pro-

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46. *See* Joseph G. Allegretti, The Lawyer's Calling: Christian Faith and Legal Practice (1996); Thomas L. Shaffer, American Lawyers and Their Communities: Ethics and the Legal Profession (1991); Thomas L. Shaffer, Faith and the Professions (1987); Thomas L. Shaffer, On Being a Lawyer and a Christian: Law for the Innocent (1981).

47. Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 Loy. L.A. L. Rev. 1543 (1996); Symposium, *Faith and the Law*, 27 Tex. Tech L. Rev 911(1996); Symposium, *The Relevance of Religion to a Lawyer's Work*, 66 Fordham L. Rev. 1075 (1998).

48. They are Thomas Shaffer at Notre Dame and the University of Virginia, Howard Lesnick at the University of Pennsylvania, Sanford Levinson at the University of Texas, Joseph Allegretti at Creighton University, and me. I was blessed to have been in the first of these, Thomas Shaffer's seminar at the Univerity of Virginia in 1976. He credits that seminar with inspiring his book, *On Being a Christian and a Lawyer.* The seminar profoundly affected the lives of those in the class.

49. Such a seminar at Pepperdine led to the founding of our legal aid clinic for the homeless, a partnership with the Los Angeles Union Rescue Mission.

fessional ideals within our smaller communities? It is my hope that as we seek to identify lawyer ideals within our traditions, a common vision will emerge; that, as Anthony Cook has said Martin Luther King found—as we go deeper into our particularities, we find commonalities.[50] But I suspect that that is a long way down the line for the legal profession. The business that we should now be about is taking the moral resources that we have and applying them to the practice of law.

50. *See* CLS Forum, *supra* note 44.